No. 15,106

United States Court of Appeals

For the Ninth Circuit

RICAREDO BERNABE DELA CENA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

The United States District Court for the District of Hawaii had jurisdiction of Appellant's petition for naturalization under the provisions of Section 1421, Title 8, U.S.C. This Court has jurisdiction of Appellant's appeal from the denial of that petition under the provisions of Section 1291, Title 28, U.S.C.

STATEMENT OF THE CASE.

Appellant is a native and a national of the Philippine Republic (R. p. 12). He filed a petition for naturalization with the United States District Court for the District of Hawaii September 2, 1955 (R. pp.

3-6). The United States Naturalization Examiner, Stephen A. Durisch, recommended denial of the petition (R. pp. 10, 26). The District Court denied the petition on December 22, 1955 (R. pp. 6, 10-11).

Appellant served honorably in the United States Army in the Philippine Islands and in Okinawa from March 5, 1946 to February 11, 1949 (R. pp. 13, 30, 32). His enlistment was for a term of 3 years and he was honorably discharged shortly before the expiration of that term because of the demobilization of his regiment. Appellant enlisted in the United States Navy on March 8, 1954 in the Philippine Islands and is still serving therein. He first arrived in the United States at San Francisco, California, on April 1, 1954, as a seaman in the United States Navy and without immigration inspection and has been within the United States ever since (R. p. 13).

Appellant urged the trial Court that he was entitled to be naturalized under at least one of the following statutes:

Immigration and Nationality Act of June 27, 1952, Sec. 329, 66 Stat. 250, 8 U.S.C.A. 1440 (R. pp. 19-21).

Act of June 30, 1953, Public Law 86, 83rd Congress, Chapter 162, 1st Session, 67 Stat. 108, Sec. 1440a, 8 U.S.C.A. 1440a (R. pp. 14-16).

Section 324A of the Nationality Act of 1940 as amended by Act of June 1, 1948, 62 Stat. 281 (R. pp. 22-23).

The Naturalization Examiner contended in substance that Appellant has never been "lawfully admitted to

the United States for permanent residence" and that consequently he is not entitled to naturalization under Secs. 1440 or 1440a, Title 8, U.S.C. or under Sec. 324A of the Nationality Act of 1940.

STATUTES INVOLVED.

In addition to the statutes referred to above Appellant believes that Sections 403(a) and 405 (66 Stat. 280, 8 U.S.C. Sec. 1101, note) of the Immigration and Nationality Act of June 27, 1952, should be considered in determining the questions raised by this appeal. Section 403(a) (41) repeals Section 324A of the Nationality Act of 1940 as amended. Section 405 provides in part as follows:

> "Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to . . . affect any . . . status, condition, right in process of acquisition . . . , done or existing at the time this Act shall take effect; but as to all such . . . conditions, rights, acts, things . . . or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *"

Also to be considered is Section 402(c) of the Immigration and Nationality Act of 1952.

QUESTIONS PRESENTED.

1. Is an alien serviceman who enters the United States under military orders but without immigration

inspection or examination to be deemed as having been "lawfully admitted for permanent residence" as that term is used in Sections 1440 and 1440a, Title 8, U.S.C. or in Section 324A of the Nationality Act of 1940 (formerly Sec. 724A, Title 8, U.S.C.)?

2. Did Appellant acquire any status, condition, or right in process of acquisition under Section 324A of the Nationality Act of 1940 as amended?

SPECIFICATION OF ERRORS.

1. The District Court erred in failing to answer either of the foregoing questions in the affirmative.

2. The District Court erred in refusing to admit evidence that Appellant intended to and did enter the United States for permanent residence (R. p. 34). In this connection a stipulation was offered to the trial Court but it ruled as follows: "I will reject the stipulation as irrelevant, then."

ARGUMENT.

I.

APPELLANT IS TO BE DEEMED TO "HAVE BEEN LAWFULLY ADMITTED TO THE UNITED STATES FOR PERMANENT RESIDENCE".

A. Lawful Admission.

A member of the armed forces of the United States who enters this country under military orders has been lawfully admitted to the United States even

though he is subjected to no immigration inspection or examination at the time of his entry. *Petition of Barandiaran,* 123 F. Supp. 268 (1955-D.C.S.D.N.Y.); *Petition of Zaino,* 131 F. Supp. 456 (1955-D.C. S.D.N.Y.); *In re Echiverri,* 131 F. Supp. 674 (1955-D.C.D. Hawaii).

Similarly seamen who entered the United States on temporary passes, who overstayed the period of their passes, and who thereafter performed honorable military service have been held to have been lawfully admitted for purposes of naturalization. *Petition of Bozin,* 70 F. Supp. 5 (1947-D.C.S.D. Calif.); *In re Apollonio,* 128 F. Supp. 288 (1955-D.C.S.D.N.Y.). Language used by the Court in the *Bozin* case could be applied equally well to the Appellant herein:

> "An alien's admission is unlawful if gained without actual permission, or if permission be procured by means of actual fraud. There is no suggestion of any such irregularity surrounding petitioner's entry. No declaration of intent was required as a condition precedent to admission. Josip Bozin entered this country 'standing up', in his own name, without misrepresentation, and with the express permission of the proper authorities." (p. 7.)

In the *Echiverri* case, supra, the Court said this of a seaman in the United States Navy who entered the country under the same circumstances as the Appellant:

> "No suggestion has been made that his admission to the United States was gained by any misrepresentation, concealment, fraud, or any other

> artifice. On the contrary, the record clearly discloses that at the time of his entry he was an enlisted man on an active duty status, acting pursuant to the orders of his superior officers, that his entry was authorized by the then effective regulations, and that as to him there was a waiver of inspection and examination as required by the above-mentioned statute." (p. 676.)

Section 175.48, Title 8, C.F.R. (Supp. 1947), which exempted an alien member of the Armed Forces of the United States from the production of travel documents was the basis for the "waiver" referred to by the Court in the *Echiverri* decision. Substantially the same regulation, which was in effect at the time Appellant entered the country, was given the same effect in *Petition of Zaino,* 131 F. Supp. 456 (1955-D.C.S.D.N.Y.). This regulation, to-wit: Section 212.4, Title 8, C.F.R., provided as follows:

> "Sec. 212.4. Additional classes of non-immigrants not required to present passports, visas or border crossing identification cards. As provided in the Immigration and Nationality Act, the provisions of section 212 (a) (26) of the Immigration and Nationality Act and of this chapter relating to the requirement of passports, visas and border crossing identification cards for non-immigrants do not apply in the cases of aliens who fall within any of the following categories:
>
> (a) An alien member of the armed forces of the United States who:
>
> (1) Is in the uniform of, or who bears documents identifying him as a member of, such armed forces;

(2) Has not been lawfully admitted for permanent residence; and

(3) Is making application for admission to the United States under official order or permit of such armed forces."

B. For Permanent Residence.

Whether Appellant entered the United States for and with the intent to establish his permanent residence here is something which could be determined only by an examination of the Appellant. Evidence pertaining to this matter was not allowed by trial court and, in fact, a stipulation to the effect that Appellant intended to reside permanently in the United States at the time of entry was rejected by the Court (R. p. 34). In this respect it is submitted that the trial Court erred. Nor can it be argued that Appellant's entering of the United States for permanent residence made such entry an unlawful one for unlike a temporary visitor who has proclaimed that he does not intend to stay, Appellant entered under orders, no inspection or examination was made to determine his status at the time of entry, and his entry was not procured by fraud or misrepresentation.

Entirely apart from Appellant's intent at the time of his entry his admission is now to be considered as having been made "for permanent residence" under the provisions of Section 402 (e) of the Immigration and Nationality Act of June 27, 1952 (66 Stat. 163) which provides in part as follows:

"Any alien enlisted or reenlisted pursuant to the provisions of this Act who subsequently enters

> the United States, . . . pursuant to military orders shall, if otherwise qualified for citizenship, and after completion of five or more years of military service, if honorably discharged therefrom, be deemed to have been lawfully admitted to the United States for permanent residence within the meaning of such section 329(a)."

Appellant has completed more than five years of honorable service with the Armed Forces of the United States and he has been honorably discharged from such Armed Forces. In view of the liberal construction which the courts have given to these statutes which are designed to reward aliens who like the Appellant have rendered both loyal and honorable military service to the United States, Section 402 (e) should be construed as not requiring that the honorable discharge follow the five year period of service.

In *Petition of Zaino,* supra, the petitioner was illegally admitted to this country in 1929. He served in the United States Army from 1950 to 1952, part of the time in Korea. He returned from Korea and entered the United States under military orders. He petitioned for naturalization thereafter under the provisions of 8 U.S.C.A. 1440a, Act of June 30, 1953, 67 Stat. 108. The Court found that he qualified under the provision of the statute which reads as follows:

> ". . . or (2) having been lawfully admitted to the United States and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces, . . ."

The Court held that it made no difference that petitioner's lawful admission followed his induction into the Armed Forces. So here, Appellant submits that it should make no difference that he received an honorable discharge prior to the expiration of his five years of military service, so long as it is conceded that his present service has been and is entirely honorable.

Appellant, having served honorably in the Armed Forces of the United States for in excss of three years and part of that time after September 1, 1939, and before December 31, 1946, and having been lawfully admitted to the United States for permanent residence, is eligible for naturalization under the provisions of the Act of June 30, 1953, 67 Stat. 108, 8 U.S.C.A. 1440a (R. pp. 14-16), and of Section 329 of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 250, 8 U.S.C.A. 1440 (R. pp. 19-21).

II.

BY VIRTUE OF THE SAVINGS CLAUSE CONTAINED IN THE IMMIGRATION AND NATIONALITY ACT OF 1952 APPELLANT ALSO QUALIFIES UNDER THE ACT OF JUNE 1, 1948, 62 Stat. 281.

Having served in the Armed Forces of the United States after September 1, 1939, and before December 31, 1946, Appellant is likewise qualified for naturalization under the provisions of Section 324A of the Nationality Act of 1940 as amended by the Act of June 1, 1948, 62 Stat. 281.

Section 324A was repealed by Section 403 (a) (41) of the Immigration and Nationality Act of 1952, but Appellant's right to be naturalized under it is preserved by Section 405 of the same Act. The weight of authority since the decision in *Bertoldi v. McGrath,* 178 F. 2d 977 (1949-U.S.C.A.D.C.) has been that a right in the process of acquisition is preserved under a savings clause such as is contained in Section 405. *United States v. Menasche,* 348 U.S. 528 (1955); *Aure v. United States,* 225 F. 2d 88 (1955-C.A. 9); *United States v. Shaughnessy,* 221 F. 2d 578 (1955-C.A. 2); *Petitions of F. G. & E. G.,* 137 F. Supp. 782 (1956-D.C.S.D.N.Y.); *Petition of Pringle,* 122 F. Supp. 90 (1953-D.C.E.D. Va.); *In re Jocson,* 117 F. Supp. 528 (1954-D.C.D. Hawaii). In the *Aure* case this Court ruled that

> ". . . the savings clause is not limited to cases involving affirmative action and those concerning derivative citizenship, but its preservation feature should be extended to all substantive rights existing at the time the statute creating the rights was repealed."

Appellant had a right in the process of acquisition or a status or condition at the time Section 324A was repealed, there remaining only his lawful admission to the United States for permanent residence to complete that right.

CONCLUSION.

Having in mind the loyal service which Appellant has rendered to the United States, it is respectfully submitted that the final order of the District Court denying his petition for naturalization should be reversed.

Dated, Honolulu, Hawaii,
August 4, 1956.

HOWARD K. HODDICK,
Attorney for Appellant.